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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 749

ARTHUR SWALL,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Arthur Swall, respectfully prays that a writ of certiorari issue to review the judgment (R. 102-103) of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 20, 1941, affirming the decision of the Board of Tax Appeals.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 61-64) is unreported. The opinion of the Circuit Court of Appeals (R. 102-103) is reported in 122 F. (2d) 324.

JURISDICTION.

The judgment of the Circuit Court of Appeals affirming the decision of the Board of Tax Appeals was entered on August 20, 1941. (R. 102-103.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. [43 Stat. 938, 28 U. S. C. A., Sec. 347(a).]

QUESTION PRESENTED.

1. Whether, in order to prevent an obvious miscarriage of justice, the Board of Tax Appeals possesses the power and jurisdiction to vacate and set aside an order procured through extrinsic fraud of petitioner's former counsel to the prejudice of the petitioner, and to grant petitioner an opportunity to present his case on the merits for the first time, where such fraud is not discovered by petitioner until after the order has ostensibly become final under Section 1005(a) of the Revenue Act of 1926, as amended.

2. Whether, in order to prevent an obvious miscarriage of justice, the Board of Tax Appeals possesses the power and jurisdiction to vacate and set aside an order after it has become ostensibly final

under Section 1005(a) of the Revenue Act of 1926, as amended, where such order operates directly to the prejudice of the petitioner and is void because procured through and as a direct result of proceedings conducted in behalf of petitioner by one not admitted nor possessing the requisite qualifications to be admitted to practice before the Board of Tax Appeals, which fact is not discovered until after said order has become final as aforesaid.

STATEMENT OF THE CASE.

The following facts pertinent to the issue here involved were taken from the uncontradicted statement of facts set forth in the petition (R. 12-61) filed by the petitioner with the Board of Tax Appeals on September 23, 1940.

Petitioner, a farmer engaged in farming operations in Tulare County, California, employed one Joseph J. Scott, a former Collector of Internal Revenue at San Francisco, California, to aid him in his income tax problems arising out of the dissolution of the Swall Land Company, a family farming corporation. Petitioner authorized Scott to represent him before the Treasury Department and, after the Commissioner of Internal Revenue had assessed a deficiency against him in the sum of $5633.12, based upon an alleged profit from liquidation in the amount of $44,928.63, petitioner authorized Scott to represent him before the Board of Tax Appeals. Scott expressly represented to the petitioner that he was an attorney at law, authorized to practice before the Board. (R. 17-18.)

Scott prepared and filed with the Board all pleadings in behalf of the petitioner, but he carefully omitted his name as counsel and did not at this time give any indication to the Board that he was representing the petitioner. While this petition was pending before the Board, Scott succeeded in exacting a sum of money from the petitioner upon the representation that he would submit the same as an offer in compromise to the Commissioner of Internal Revenue in Washington, D. C. Actually he embezzled the same for his own personal use. In order to conceal his embezzlement of petitioner's funds, Scott had petitioner sign a motion of dismissal of the proceedings before the Board of Tax Appeals upon the false and fraudulent representation that by so doing he could better proceed with the offer of compromise pending before the Bureau. Pursuant to this motion of dismissal, a consent order was entered by the Board on September 30, 1933, confirming the findings of the Commissioner in regard to the petitioner's income tax liability for the year 1925. After the entry of this judgment, Scott abandoned the case and never at any time submitted an offer in compromise. Scott thus sold out his client for his own personal gain and prevented him from having a hearing on the merits. (R. 19-22.) Petitioner and his brothers were at no time apprised by Scott or anyone else that the effect of the dismissal of their petition before the Board would automatically result in a judgment for the Government. They believed that this course of action was undertaken to enable Scott to compromise their claim successfully before the Treasury Department. (R. 22-23.)

Scott committed a further fraud upon the Board of Tax Appeals, the Government and the petitioner when he appeared as counsel for the petitioner before the Board for the purpose of filing the notice of dismissal in San Francisco, California, on September 20, 1933. The motion was granted only after Scott had formally represented to the Board that he was counsel for the petitioner. Scott's name appears as follows in the minutes of the proceedings at San Francisco:

"Counsel for Petitioner:

Joseph J. Scott, Esq.,
Financial Center Bldg.,
San Francisco, California."

Actually Scott was never admitted nor possessed the requisite qualifications to be admitted to practice before the Board and was only admitted to practice before the Treasury Department from which he resigned in 1934. The petitioner did not learn of these facts until long after the consent order of the Board had become final under Section 1005(a) of the Revenue Act of 1926, as amended. (R. 21-23.)

The petitioner petitioned the Board of Tax Appeals to vacate its consent order of September 30, 1933, on the ground that (1) the order was void since it had been procured as a direct result of proceedings conducted by one not admitted nor possessing the requisite qualifications to be admitted to practice before the Board of Tax Appeals, and (2) Scott, petitioner's former counsel, had sold out his client's case for his own personal gain, preventing him from having a hearing on the merits. The Board denied petitioner

the relief sought (R. 61-64), and the Court below affirmed the decision of the Board (R. 102-103), holding the Board did not possess the power or jurisdiction to vacate one of its orders on the ground of extrinsic fraud after the order had become final under Section 1005(a) of the Revenue Act of 1926, as amended.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the Board of Tax Appeals did not have the power or the jurisdiction to vacate and set aside an order procured through extrinsic fraud of petitioner's former counsel to the prejudice of petitioner, and to grant petitioner an opportunity to present his case on the merits for the first time, where such fraud was not discovered until after the order had ostensibly become final under Section 1005(a) of the Revenue Act of 1926, as amended;

2. In holding that the Board of Tax Appeals did not have the power or the jurisdiction to vacate and set aside an order after it had ostensibly become final under Section 1005(a) of the Revenue Act of 1926, as amended, where such order operated directly to the prejudice of the petitioner and was void because procured through and as a direct result of proceedings conducted in behalf of petitioner by one not admitted nor possessing the requisite qualifications to be admitted to practice before the Board of Tax Appeals, which fact was not discovered until after said order had become final as aforesaid;

3. In failing and refusing to hold that the Board of Tax Appeals has the power, the jurisdiction and the duty to vacate and set aside an order procured through extrinsic fraud of petitioner's former counsel to the prejudice of petitioner, and to grant petitioner an opportunity to present his case on the merits for the first time, although such fraud was not discovered until after the order had ostensibly become final under Section 1005(a) of the Revenue Act of 1926, as amended;

4. In failing and refusing to hold that the Board of Tax Appeals has the power, the jurisdiction and the duty to vacate and set aside an order after it had ostensibly become final under Section 1005(a) of the Revenue Act of 1926, as amended, where that order operates directly to the prejudice of the petitioner and is void because procured through and as a direct result of proceedings conducted in behalf of petitioner by one not admitted nor possessing the requisite qualifications to be admitted to practice before the Board of Tax Appeals, which fact was not discovered until after such order had become final as aforesaid;

5. In failing to reverse the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Circuit Court of Appeals for the Ninth Circuit that the United States Board of Tax Appeals does not have the power or jurisdiction to vacate and set aside one of its orders after it has become final, where such order was procured through

extrinsic fraud, is in direct conflict with the decision of the Fifth Circuit Court of Appeals in *La Floridienne J. Buttgenbach & Company v. Commissioner,* 63 F. (2d) 630. It is also in conflict, in principle, with the decision of this Court in *Lane v. United States, ex rel. Mickadiet,* 241 U. S. 201, holding that a decision of the Secretary of Interior with respect to the person entitled to succeed to Indian tribal lands, which was made final and conclusive by law, could be vacated by fraud, and with *U. S. v. Atkins,* 260 U. S. 220, holding that a final decision of the Dawes Commission could be vacated because of extrinsic fraud.

2. The decision of this Court in *Helvering v. Northern Coal Company,* 293 U. S. 191, relied upon by the Circuit Court of Appeals for the Ninth Circuit as the sole authority for its decision, is not applicable to the facts in this case. That case involved an attempt to vacate an order of the Board of Tax Appeals after it had become final, following a full and complete hearing on the merits, on the ground that such order was based upon an incorrect rule of law in view of a subsequent decision of this Court. There was no question of extrinsic fraud in the *Northern Coal Company* case. The controlling decision in cases involving extrinsic fraud is *U. S. v. Throckmorton,* 98 U. S. 61, wherein it was expressly recognized by this Court that the fraud of one's attorney in selling out his client's case for his own personal gain constitutes a ground for setting aside a decision which has become final.

3. The decision of the Circuit Court of Appeals for the Ninth Circuit that the Board of Tax Appeals

does not have the power or jurisdiction to vacate and set aside one of its orders after it has become final, where such order was procured through extrinsic fraud, is contrary to the Report of the Senate Finance Committee as to the powers of the Board of Tax Appeals, S. Rep. No. 52, 69th Cong., 1st Sess., pp. 25-26. [1939-1 Cum. Bull. (part 2) 332, 351.]

4. The question whether the Board of Tax Appeals has the power and jurisdiction to vacate and set aside one of its orders after it has become final, where such order was procured through extrinsic fraud is an important question of Federal income tax law not heretofore decided by this Court.

The denial of power in the Board to correct obvious wrongs could lead to absurd and unjust results never intended or contemplated by Congress. Without such power, the Board could not correct a decision which ordered a large refund, even though the taxpayer had secured a consent order therefor by bribery which was not discovered until after the period for filing a petition for review had expired. Nor could the Board correct a decision entered in violation of its duty to give the taxpayer notice and an opportunity to be heard. It could not correct a decision based upon a stipulation for settlement unauthorized by the taxpayer and to which his signature had been forged. It could not expunge a decision entered by default due to the death of counsel for the taxpayer. It could not correct a decision ordering a deficiency for the year 1926 when the year 1927 was intended, thereby causing a loss of revenue to the Government. It could not

correct an order where, due to failure of notice, the taxpayer defaulted and decision was entered in accordance with deficiency notice, as provided by the statute in such cases. The list of such possibilities could be lengthened *ad infinitum*. Such facts cannot always be discovered within the three months' period for taking an appeal, at the end of which the Board's decision is said to be a final decision. Sec. 1005(a), Rev. Act, 1926, as amended. Without such power the Board will often be powerless to find the true liability of the taxpayer—its sole function under the Revenue Acts, *Peerless Woolen Mills*, 13 B. T. A. 1119, and will not have the flexible procedure which Congress intended it to possess, and will not afford that complete remedy to taxpayers for which it was designed.

The Government, being cognizant of this situation, conceded in its respondent's brief before the Circuit Court of Appeals in this proceeding that the Board had authority to vacate its decree when secured through extrinsic fraud. (Respondent's Brief, p. 21.)

5. The Circuit Court of Appeals for the Ninth Circuit committed prejudicial error in rendering a decision adverse to the petitioner without discussion of the very issue presented by the Government and the taxpayer alike, namely, the effect of extrinsic fraud on a final order of the Board of Tax Appeals.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review

and determination, on a day certain to be therein named, a full and complete transcript of the record in the above-referenced proceedings, and that said judgment of the Circuit Court of Appeals for the Ninth Circuit be reversed; that your petitioner be granted a hearing on the merits for the first time; and that your petitioner may have such other and further relief as to this Court may seem proper in the premises, in order to prevent petitioner from suffering great and irreparable damage.

Dated, Washington, D. C.,
November 12, 1941.

CHARLES B. MCINNIS,
Attorney for Petitioner.

JOSEPH CHANSLOR KIMBLE,
HOWARD BERKELEY THOMAS,
KIMBLE & THOMAS,
ROBERTS & MCINNIS,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this.....day of November, 1941.

.....

Solicitor General of the United States,

.....

Counsel for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 749

ARTHUR SWALL, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The court below has held that the Board of Tax Appeals lacks the power or jurisdiction to vacate a decision entered by it which has become final prior to the filing of a petition to vacate. Apparently the holding of the court below is not made to rest upon the particular facts of the present case but is to the effect that the Board lacks the power in any circumstances to vacate a decision if the petition to vacate is not filed before the decision becomes final. In this respect the holding below conflicts with *La Floridienne J. Buttgenbach & Co.* v. *Commissioner,* 63 F. (2d)

630 (C. C. A. 5th), which held, although upon materially different facts, that the Board might vacate a decision some four years after the decision was entered. We believe that there is doubt as to the correctness of the result reached in the *Buttgenbach* case, particularly in view of the later decision of this Court in *Helvering* v. *Northern Coal Co.*, 293 U. S. 191. See *Sweet* v. *Commissioner*, 120 F. (2d) 77, 81 (C. C. A. 1st).

If the conclusion of the court below that the Board lacks power to vacate its earlier decision were confined to the facts of the present case we believe that that conclusion would be clearly correct under the decision of this Court in *Helvering* v. *Northern Coal Co., supra,* and would not conflict with the decision of any other court.

The taxpayer's petition to the Board to review the deficiency determined by the Commissioner for the year 1925 was filed on January 22, 1930 (R. 1, 3–8). After numerous delays the matter was finally set for hearing by the Board on September 20, 1933, after due notice to both parties (R. 61). On September 30, 1933, a motion signed and sworn to by the taxpayer was filed with the Board moving that the petition be dismissed and that the Board determine the deficiency in tax as determined by the Commissioner (R. 11). On that day the Board entered an order which, after reciting that the proceeding was called on the taxpayer's motion to dismiss to which the Commissioner did

not object, granted the motion, dismissed the proceeding for lack of prosecution, and entered a deficiency for the year 1925 in the amount of $5,633.12 (R. 12). A copy of this order was sent to the taxpayer (R. 23). Seven years later, on September 23, 1940, the taxpayer lodged a petition with the Board praying that the order of September 30, 1933, be vacated, that the taxpayer be allowed to amend his pleadings, and that he be afforded the opportunity of establishing his case on the merits (R. 2, 12, 32). Two grounds were relied upon by the taxpayer as justifying the vacating of the order of September 30, 1933, which had dismissed the proceeding, namely: (1) that the order was void because the taxpayer's representative, Scott, who presented the taxpayer's motion to dismiss to the Board, had not been admitted and did not possess the requisite qualifications to be admitted to practice before the Board, and (2) that Scott had fraudulently induced the taxpayer to dismiss the proceeding for his own personal gain (R. 14–15).

Assuming, as alleged by the taxpayer, that his representative, Scott, committed a fraud upon him, there is no suggestion that the Government or the Board was in any respect a party to this fraud, and accordingly it would seem clear that the taxpayer's sole remedy is against his representative. The action of the Board in dismissing the proceeding upon the taxpayer's own motion

for lack of prosecution was amply justified, since the proceeding had been pending for more than three and a half years. The fact that taxpayer's own representative may have committed a fraud upon him is immaterial, for fraud constitutes a ground for relief from a judgment only where it is the fraud of an adverse party or someone for whose conduct the adverse party is responsible. *Miller Rubber Co.* v. *Massey,* 36 F. (2d) 466 (C. C. A. 7th), certiorari denied, 281 U. S. 749; *Continental Nat. Bank.* v. *Holland Banking Co.,* 66 F. (2d) 823, 835 (C. C. A. 8th); *United States* v. *Throckmorton,* 98 U. S. 61, 65–66; *Welsh* v. *Koch,* 4 Cal. App. 571; *Lanier* v. *Nunnally & Co.,* 128 Ga. 358; *Kulhanek* v. *Kulhanek,* 106 Neb. 595; 3 Freeman on Judgments (5th Ed.), Section 1238. Furthermore, as held by the Board of Tax Appeals in the present case (R. 63–64), the taxpayer has been guilty of gross laches in asserting his alleged rights.

In the *Buttgenbach* case, *supra,* relied upon by the taxpayer, the decision of the Board was entered pursuant to a stipulation to which the Commissioner was a party, and the Commissioner later conceded that the stipulation rested upon a false and mistaken basis and consented to the vacating of the Board's decision. The Circuit Court of Appeals in that case stated that if the decision should stand it would operate as a fraud in the peculiar circumstances of that case arising out of

the confidence that the inexperience of the taxpayer put in the knowledge and experience of the Commissioner. That case, therefore, is sharply distinguishable from the present case.

Moreover, the question presented does not arise frequently and therefore cannot be said to be of general importance. Taking all the elements into consideration—the fact that this case is not actually in conflict with the *Buttgenbach* case, the fact that the status of the *Buttgenbach* case itself is doubtful in the light of this Court's subsequent decision in the *Northern Coal Co.* case, the fact that the question raised is probably not one of general importance—it would seem that further review is not called for, notwithstanding the apparent conflict with the *Buttgenbach* decision.

The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DECEMBER 1941.

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